Supreme Court, U.S.
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No. 95-1482

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

FERNANDO E. MATA,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION, *ET AL.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION

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REPLY BRIEF IN SUPPORT OF THE PETITION

I.

The government concedes that the Fifth Circuit's construction of Title VII eliminates the third stage of the *McDonnell Douglas* framework for proving Title VII claims. Br. Opp. 8-9. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973). The government argues that this result is compelled by a *non-Title VII* case, *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), and the "unanimous" conclusion of two courts of appeals, including the Fifth Circuit here. Br. Opp. 9-10.

The two decisions create an irreconcilable -- and unnecessary -- conflict between *Egan* and *McDonnell Douglas*. First, under *McDonnell Douglas*, a Title VII "plaintiff *must* be given the opportunity to introduce evidence

that the proffered justification [for the employment action] is merely a pretext." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) (emphasis added); *see also United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 n.5 (1983). The government does nothing to reconcile this fundamental conflict.[1]

Second, the conflict is unnecessary given the plain, unambiguous language of Title VII. Title VII states: "All personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). From this all-inclusive coverage of Title VII, Congress carved out an affirmative defense based on "national security." 42 U.S.C. § 2000e-2(g). Using *Egan*, the government attempts to add yet another exception based on national security -- an *implicit* ouster of all *jurisdiction*. However, this Court does not permit the judiciary to create exceptions to the plain language of statutes where Congress has not done so. *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 26 (1993).

Notwithstanding Title VII's unambiguous language and statutory structure, the government argues that Congress has not expressly provided for review of security clearance decisions. Br. Opp. 10. However, the government offers no explanation as to how Congress could have made its intent any clearer. *See South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2315-16 (1993) ("when Congress used the term 'all claims, rights, and demands' of the Tribe . . . it meant *all* claims,

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[1] Another case cited by the government, *Guillot* v. *Garrett*, 970 F.2d 1320 (4th Cir. 1992), is not even a Title VII case. The plaintiff there alleged that the Navy violated section 501 of the Rehabilitation Act of 1973 "by terminating him because of his alleged handicap of alcoholism and cocaine addiction." *Id.* at 1323.

rights, and demands") (emphasis in original) (citation omitted). Interpreting Title VII in accordance with its plain language avoids any conflict between *Egan* and *McDonnell Douglas*.[2]

II.

The Fifth Circuit's interpretation of Title VII also presents the "serious constitutional question" whether a federal statute may be "construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). Petitioner cannot bring a *Bivens* action, argues the government, because Title VII is a kind of statutory mirage: it exists to provide Petitioner his "exclusive judicial remedy"; but it vanishes when Petitioner actually tries to employ it, depriving all courts of all jurisdiction to remedy violations of the Constitution. Br. Opp. 13-14.

The sweep of the Fifth Circuit's holding is without precedent in this Court. We are unaware of any case from this Court, and the government cites none, holding that

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[2] The government also does not dispute that *Chevron* requires deference to the EEOC's construction of Title VII. *See Chevron, U.S.A.* v. *Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984). Even after *Egan*, courts are "not precluded from determining whether the grant, denial or revocation of security clearances is conducted in a nondiscriminatory manner." *EEOC: Policy Statement on National Security Defense to Bias Charges*, 8 Lab. Rel. Rep. (BNA) 405:6625, 405:6626 (May 1, 1989). "Employers cannot, *merely by invoking national security*, exempt themselves from coverage of the nondiscrimination provisions of [Title VII]." *Id.* The EEOC cases cited by the government, Br. Opp. 12 n.3, are consistent with this policy statement.

Congress can deny *any* judicial forum for a violation of fundamental constitutional rights.[3]

This Court always has required that some meaningful relief be afforded those whose fundamental constitutional rights have been violated. Thus, Title VII does not pre-empt a *Bivens* action when the plaintiff is "unprotected by the statute." *Davis* v. *Passman*, 442 U.S. 228, 247 (1979). This Court accorded a non-Title VII judicial remedy for a claim of federal employment discrimination to an alien who was not protected by Title VII, *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 (1976), and provided a judicial remedy for a homosexual who was not covered by Title VII, notwithstanding the CIA's argument that judicial review would "entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security." *Webster*, 486 U.S. at 604.

The government fails to distinguish Petitioner's case from *Davis* or *Webster*. First, the government claims that, "unlike Petitioner," the plaintiff in *Davis* was "excluded entirely from the protection of Title VII and had no statutory remedy at all." Br. Opp. 14. The government nowhere explains how Petitioner is "protected" by Title VII when that

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[3] Congress surely has the power to narrow the remedies afforded a plaintiff for violations of constitutional rights. *See, e.g., Chappell* v. *Wallace*, 462 U.S. 296, 302-03, 305 n.2 (1983) (refusing to allow *Bivens* actions by military personnel against military superiors but noting the availability of statutory provisions for redress); *Bush* v. *Lucas*, 462 U.S. 367, 368, 387 (1983) (refusing *Bivens* action where statute provides "meaningful remedies against the United States," including a "trial-type hearing"); *Schweiker* v. *Chilicky*, 487 U.S. 423 (1988). But Congress cannot eliminate them altogether.

statute provides him no remedy; and the government does not identify any other statutory remedy available to Petitioner.[4]

Second, the government distinguishes *Webster* on the sole basis that the equitable relief sought in that case, "reinstatement," is different from the damages and equitable relief sought in this one. Br. Opp. 14-15. That trivial distinction actually undermines the government's argument, because the remedies sought by Petitioner are far less intrusive on the government than the reinstatement remedy sought by the *Webster* plaintiff. More importantly, the relevant question is whether the Constitution allows Congress to eliminate *all* judicial remedies for the government's violation of a person's rights under the First and Fifth Amendments. *Webster* and *Davis* hold that it does not, even when the interests at stake (sexual orientation and gender) fall on the periphery of constitutional rights. The violations here -- retaliation and racial discrimination -- go to the core of our constitutional rights, and require some meaningful judicial remedy.[5]

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[4] Petitioner had no opportunity to examine documents, call witnesses, cross-examine witnesses, or participate in an evidentiary hearing. His fate was left in the hands of those who were found to have discriminated against him. Accordingly, the government cannot legitimately claim that Petitioner "had the benefit of" any meaningful remedy. Br. Opp. 15.

[5] The government also seeks to avoid this issue by arguing that, although a *Bivens* action was expressly alleged in the Second Amended Complaint, R. 57, Petitioner failed properly to plead one. Br. Opp. 12. The government made the same argument in both the District Court and the Court of Appeals, and both courts rejected the argument and addressed the *Bivens* issue. Pet. App. 4a, 8a-9a. This Court should do the same.

III.

Finally, the government tries to redefine Petitioner's claim as "a review of a security clearance" so that the FBI can hide behind the protection of *Egan*. However, Petitioner's claim is about *retaliation*, not the revocation of a security clearance.[6]

For fifteen years Petitioner had a spotless record at the FBI. Nothing happened to him until he joined the *Perez* class action. After that he was berated in front of his fellow agents, threatened in connection with his testimony, made the subject of an investigation, and fired. Pet. at 4-7.

The FBI's investigation found that Petitioner had not violated any laws, or any internal rules, regulations, policies or procedures of the FBI or DOJ. *See* Pet. 5-6. Thus, in its own internal memorandum, the FBI concluded that "all *logical* investigation has been completed in an attempt to verify these allegations [against Petitioner], *without result*." R. 273 (emphasis added); *see* Pet. 5.

Nevertheless, instead of dropping the matter, the FBI continued its retaliation. Contrary to the government's assertions, the court need not scrutinize the merits of the revocation decision to conclude that the FBI's decision to go forward was merely a pretext. The court could find that the FBI continued its investigation of Petitioner -- after all *logical* investigation had been completed, and after the FBI had admitted that Petitioner had done nothing wrong -- only because Petitioner dared to join the Hispanic agents in their successful Title VII suit against the FBI.

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[6] The government distorts the record in an attempt to portray Petitioner as someone who, after a distinguished career, suddenly and inexplicably went on a binge of unauthorized disclosures. Contrary to the government's assertions, *see* Br. Op. 3-4, Petitioner did not "admit" the FBI's allegations of wrongdoing; in fact, he has consistently denied them. *See* R. 174-77, 203.

Citing *Brazil* v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1317 (1996), the government argues that there is no reason for the Court to review this case. Br. Opp. 7. Far from it. The undisputed retaliation against Petitioner distinguishes this case from *Brazil*. In *Brazil*, no actionable events had occurred before the revocation to show that it was a pretext. The court would have had to evaluate the merits of the revocation decision because that decision was the only action challenged by the plaintiff. *Id.* at 197. In other words, had the Navy chosen *not* to revoke the plaintiff's security clearance, he would have had no claim.

Here, by contrast, Petitioner obtained a judgment against the FBI for racial discrimination. The FBI retaliated against him for having done so, and the revocation came merely as a finishing touch to a course of retaliatory conduct. Had the FBI decided not to revoke Petitioner's security clearance, the court would have had jurisdiction over Petitioner's claims based on the earlier retaliation. The subsequent revocation of Petitioner's security clearance does not -- like a magic wand -- make the court's jurisdiction disappear. The government offers no reason why Petitioner should have no remedy for the actionable retaliation that occurred before, and independent of, the revocation decision.

Moreover, based on the FBI's own documents, the court can determine that the FBI never could have gotten to the point of even considering Petitioner's security clearance, unless it had a retaliatory motive. Thus, irrespective of the proffered reasons for the revocation decision, Petitioner can show pretext based on the FBI's treatment of him before he joined *Perez*, the FBI's reaction to his participation in *Perez*, the timing of the FBI's actions, the FBI's conduct against other persons who, after investigation, have been found to have done nothing wrong, and the FBI's general policy and

practice with respect to minorities. *See McDonnell Douglas*, 411 U.S. at 804-05 (1973).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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